SUPREME COURT, U. S.

OCT 21 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 642.

SAMUEL J. ZUSMANN, SR., Trustee in Bankruptcy for WALTER R. THOMAS, ATHENS, INC., ET AL., Bankrupts,
Petitioner,

v.

NATIONAL ACCEPTANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, National Acceptance Company (hereinafter sometimes referred to as "NAC"), wishes to reply in opposition to the petition for writ of certiorari in the above-entitled action in regard to the questions presented, statement of the case and argument presented by the petitioner (hereinafter sometimes referred to as "the Trustee").

QUESTION PRESENTED.

On this petition for a writ of certiorari, the only question presented to this Court is whether there is a sufficient basis under Rule 19 of the Rules of the Supreme Court of the United States to grant certiorari to a court of appeals on the following issue and under the following circumstances: When a debtor is obligated to a secured creditor to pay attorney's fees pursuant to written instruments, in a later bankruptcy is the amount of such attorney's fees to be determined pursuant to state law or is the amount discretionary with the bankruptcy court regardless of state law, where this Court held that state law should be followed in **Security Mortgage Company v. Powers**, 278 U. S. 149, 49 S. Ct. 84, 73 L. Ed. 236 (1928), and all the courts of appeals in which the question has been raised since **Security Mortgage v. Powers**, *supra*, have decided uniformly in favor of following state law, including the court below.

The other questions raised by the Trustee are not appropriate for consideration by this Court for reasons discussed below.

STATEMENT OF THE CASE.

The parties to this case entered into a short stipulation of facts for consideration of the United States Court of Appeals for the Fifth Circuit which sets out fully the facts prior to adjudication by the Referee below (R. 14-20). The Court is respectfully directed to that stipulation, which, for purposes of this petition, essentially states that: NAC obtained valid and perfected liens and security interests in the property of the debtor in 1963; NAC notified the debtor on April 3, 1964, that it was in default, and gave debtor notice of intention to collect attorney's fees pursuant to Section 20-506 of the Code of Georgia of 1933, as amended; proceedings under Chapter XI of the Bankruptcy Act were filed on April 8, 1964, and the receiver appointed was shown at a hearing on April 11, 1964, the written demand of April 3, 1964; the debtor was adjudicated a bankrupt on May 11, 1964.

The parties have settled all claims between themselves except the amount of attorney's fees to which NAC is entitled under the facts stated above: NAC contended that it was entitled to "reasonable attorney's fees" as defined in Section 20-506 of the Georgia Code and the Trustee contended that NAC was entitled to only such reasonable attorney's fees, if any, as determined by the Referee. The Referee held that the amount of attorney's fees would be such amount as he deemed reasonable, and that he was not bound by the Georgia statute (R. 1) and on petition for review was upheld by the District Court (R. 9). These judgments were reversed by the Court of Appeals on the ground that both the allowability and amount of attorney's fees were matters governed by state law (Pet. for Cert. App. C).

The other matters discussed by petitioner in his "Statement of the Case" are either unsupported by the Record or irrelevant to the present position, and should be disregarded.

ARGUMENT.

I. The Petition Should Be Denied Due to the Unanimity of All of the Courts of Appeal Which Have Applied This Court's Decision in Security Mortgage Company v. Powers, Holding, as the Court Below Did, That State Law Controls the Bankruptcy Court's Interpretation of Written Attorneys' Fees Provisions.

The question presented,[1] as previously stated, is concerned with whether state law is controlling as to the amount of attorney's fees which is recoverable by a secured creditor against a bankrupt, based upon written instruments providing for the payment of attorney's fees, or whether the Referee in Bankruptcy can disregard state law and determine the amount of attorney's fees to be awarded in his discretion.

Respondent has asserted, and the Court of Appeals held in this case, that the question was determined by this Court in **Security Mortgage Company v. Powers**, 278 U. S. 149, 49 S. Ct. 84, 73 L. Ed. 236 (1928). In the **Security Mortgage** case, this Court construed the predecessor of the very statute of the State of Georgia now in

[1] Aside from the question presented on the merits, Petitioner has not stated a basis for this Court's jurisdiction on certiorari. It can be seen that the statute cited, 11 U. S. C., § 47 (c), merely gives this Court "jurisdiction to review judgments in accordance with the provisions of the laws of the United States," and anticipates the application of a "provision" of a "law of the United States" giving the right to appeal, apply for certiorari or other mode of review. See 2 Collier, **Bankruptcy**, ¶ 24.44 (14th Ed. 1966). Petitioner is applying for certiorari, but there is no language in 11 U. S. C., § 47 (c) which establishes such a right **in this particular case**, and such an incomplete jurisdictional statement should be viewed by the Court as a "failure . . . to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration" and therefore "a sufficient reason for denying his petition." Rule 23 (4), Rules of the Supreme Court of the United States.

question, and determined its applicability in bankruptcy, where a written instrument of indebtedness providing for recovery of attorney's fees was involved. The Court there said that the validity of the lien must be determined by Georgia law. Further,

> The construction of the contract for attorney's fees presents, likewise, a question of local law (citations omitted). Whether the liability is, under the circumstances, enforceable against the proceeds of the sale raises Federal questions peculiar to the law of bankruptcy. The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy. . . . 278 U. S. at 154, 73 L. Ed. at 240.

After deciding to remand the case for decision of issues not here relevant,[2] this Court said

> If the District Court finds that neither of said objections is so sustained, credit for the attorney's fees **shall be allowed for the amount due and secured by the lien,** in conformity with this opinion. 278 U. S. at 159, 73 L. Ed. at 243 (Emphasis supplied).

Since the **Security Mortgage** case, every Court of Appeals which has passed upon the question presented here has followed state law in determining the amount of attorney's fees to be awarded to the secured creditor in the Bankruptcy Court.

A tabulation of cases by circuit follows:

Second—

In re International Raw Material Corp., 22 F. 2d 920, 923 (2d Cir. 1927);

In re Kashmir Refinishing Co., Inc., 94 F. 2d 652, 654 (2d Cir. 1938);

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[2] That the suit was brought solely for the purpose of enhancing the amount of the debt and that the Trustee had no notice of the creditor's intention to collect attorney's fees.

In re American Motor Products Corp., 98 F. 2d 774, 775 (2d Cir. 1938);

In re Essential Industries Corp., 150 F. 2d 326, 328 (2d Cir. 1945).

Fourth—

Tawney v. Clemson, 81 F. 2d 300, 302 (4th Cir. 1936).

Fifth—

People's Homestead Assn. v. Bartlette, 33 F. 2d 561, 562 (5th Cir. 1929) and the judgment of the court below.

Tenth—

Webster Drilling Co. v. Barth P. Walker, 286 F. 2d 114, 117 (10th Cir. 1961).

See also 3 Collier, **Bankruptcy**, ¶ 63.15 at 1846 (14th Ed. 1966) and 6 Remington, **Bankruptcy**, § 2605.1 at 123 (5th Ed. 1965).

As Judge Ainsworth pointed out during oral argument of this case in the Fifth Circuit Court of Appeals "Why should every other provision of a contract be construed according to state law, but not attorney's fees?" Thus the question has been decided by this Court, and the courts of appeal are in accord with the court below as to the law, and it is respectfully submitted that there is no basis at all for granting a writ of certiorari in this case.

II. The Other Issues Raised by Petitioner Are Not Appropriate for Consideration on Petition for Certiorari.

Respondent hesitates to lengthen its responses unduly by replying to arguments which the Court will doubtless dismiss out of hand, but wishes to respond generally to additional issues raised in petitioner's "Questions Pre-

sented" and "Reasons for Granting the Writ," and discussed in his "Statement of the Case."

The arguments of petitioner regarding inequitable results due to application of a fixed percentage to arrive at the amount of attorney's fees (points 1, 2, 3 and 5) has been considered by one of the cases previously cited, **In re American Motor Products Corp.**, 98 F. 2d 774, 775 (2d Cir. 1938), and further this Court has affirmed the enforcement of attorney's fees clauses without regard to equitable principles where the contract is valid under state law. **Manufacturers' Finance Co. v. McKey**, 294 U. S. 442, 453, 79 L. Ed. 982, 988, 55 S. Ct. 444 (1935). Thus points 1, 2, 3 and 5 of petitioner's "Reasons" must fail.

The question of whether NAC complied with all of the procedural statutory requirements under Section 20-506 (point 8) cannot be raised by the Trustee at this stage for, as the Court of Appeals pointed out, the District Court held that there had been sufficient compliance with the statute and "as to this there is no cross appeal" by the Trustee (Pet. for Cert., App. C, p. 28). "Only in exceptional cases will this Court review a question not raised in the court below." **Lawn v. United States**, 355 U. S. 339, 362, n. 16, 78 S. Ct. 311, 2 L. Ed. 2d 321, 337 (1955). This disposes of point 8 of petitioner's reasons, but respondent must also add that the case of **Strickland v. Williams**, 215 Ga. 175, 109 S. E. 2d 761 (1959), specifically distinguished **Security Mortgage** as a bankruptcy case having no relation to the State receivership proceedings involved there. 215 Ga. at 179, 109 S. E. 2d at 764 (1959).

Points 4 (that the court below misinterpreted **Security Mortgage**) and 7 (that the Courts of Appeal have reached conflicting results) have been discussed in the previous argument, where it was shown that the Court of Appeals

did not misinterpret **Security Mortgage Company v. Powers**, 278 U. S. 149, 49 S. Ct. 84, 74 L. Ed. 236 (1928), which decided the very question now being raised, and further that the holding of the Court of Appeals was in accord with the uniform holdings of other circuits since **Security Mortgage**. This holding is also in accord with two of the three cases cited by petitioner at pages 9 and 10 of his brief, which follow state law in determining the allowability and amount of attorney's fees in bankruptcy. In other words, petitioner has correctly stated the holdings in the three cases, but in **McCabe v. Patton**, 174 Fed. 217 (3rd Cir. 1909), and **Webster Drilling Co. v. Barth P. Walker, Inc.**, 286 F. 2d 114, 117 (10th Cir. 1961), the holding is based upon the law of the state in which the contract was made or the land subject to mortgage situated, respectively. Only in **Mechanics American National Bank v. Coleman**, 204 Fed. 24 (8th Cir. 1913), did a court refuse to follow state law, but it will be noted that this decision was rendered prior to **Security Mortgage**.

Thus there is no decision of any Court of Appeals since the decision in **Security Mortgage Company v. Powers**, *supra*, which is inconsistent with the judgment of the court below.

CONCLUSION.

For the reasons above stated, the petition for certiorari should be denied.

Respectfully submitted,

NOLAN B. HARMON,
Counsel for Respondent.

Certificate of Service.

I, Nolan B. Harmon, of counsel for respondent in the above entitled action, hereby certify that on the 20th

day of October, 1967, I served the foregoing brief for respondent in opposition upon Morris W. Macey, counsel for petitioner, 64 Pryor Street, N. E., Atlanta, Georgia 30303, by depositing a copy in the United States mail, with sufficient postage thereon.

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Nolan B. Harmon,
Counsel for Respondent.